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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

MARGARET B. MANHARD,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and JOHN R. DaCAMARA,

Respondents.

On Petition for Writ of Certiorari
To the New York Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether the New York Court of Appeals' interpretation of the New York choice-of-law clause and the arbitration clause herein violated the policies of the Federal Arbitration Act as expressed in this Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 925 941-42, 75 L.Ed.2d 765 (1983)?

2. Whether New York Civil Practice Laws and Rules 7503's reference of statute of limitations questions to the courts is pre-empted by the Federal Arbitration Act because it is manifestly in derogation of arbitration?

Parties to the Proceeding

The parties to this proceeding are: (1) Petitioner Margaret A. Manhard ("Manhard"), an individual; (2) Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), a corporation; and (3) John R. DaCamara (a broker-employee of Merrill Lynch), an individual. Petitioner has no other personal knowledge as to the extent and nature of the parental and affiliated corporations and/or partnerships of Merrill Lynch except for the List of Merrill Lynch's "Parent Companies, Subsidiaries and Affiliates" filed by Merrill Lynch with the New York Court of Appeals, and Manhard certifies under penalties of perjury that, to the best of her knowledge, information and belief, the statement filed by Merrill Lynch, and reproduced on the following pages, is true and accurate.

IDENTIFICATION of PARTIES AND STATEMENT PURSUANT TO RULE 29.1

Pursuant to Rule 29.1 the following is a list of the parent companies, subsidaries and affiliates of Petitioner-Appellant Merrill Lynch, Pierce, Fenner & Smith, Incorporated:

Name	State or Jurisdiction of Entity
Merrill Lynch & Co., Inc.	Delaware
Merrill Lynch, Pierce, Fenner & Smith Incorporated[1]	Delaware
Broadcort Capital Corp.	Delaware
Merrill Lynch & Co., Canada Ltd.	Ontario
Merrill Lynch Canada Incorporated/Incorporee	Nova Scotia
Merrill Lynch Life Agency Inc.[2]	Delaware
Merrill Lynch Princeton Incorporated	Delaware
R.O.C. Denver, Inc.	Delaware
R.O.C. Florida, Inc.	Florida
R.O.C. Texas, Inc.	Texas
Wagner Stott Clearing Corp.[3]	Delaware
Green Equity, Inc.	New Jersey
Merrill Lynch Bank & Trust Co.	New Jersey

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[1] MLPF&S also conducts business as "Merrill Lynch & Co."

[2] MLPF&S also has 15 other subsidiaries that are engaged in business as life insurance agencies for the sale of life insurance and annuity products. In addition, MLPF&S is a partner owning 99.8% interest in a partnership that owns all of the outstanding stock of another life insurance agency. All 16 of the subsidiaries mentioned above operate in the United States.

[3] The preferred stock of the corporation is owned by an unaffiliated group of investors.

Name	State or Jurisdiction of Entity
Merrill Lynch Capital Services, Inc.	Delaware
Merrill Lynch Derivative Products, Inc.[4]	Delaware
Merrill Lynch Government Securities Inc.	Delaware
Merrill Lynch Government Securities of Puerto Rico S.A.	Delaware
Merrill Lynch Money Markets Inc.	Delaware
Merrill Lynch Mortgage Capital Inc.	Delaware
Merrill Lynch Group, Inc.	Delaware
HQ North Company, Inc.	New York
Investor Protection Insurance Company	Vermont
Merrill Lynch Capital Partners, Inc.	Delaware
Merrill Lynch Fiduciary Services, Inc.	New York
Merrill Lynch Futures Inc.	Delaware
Merrill Lynch, Hubbard Inc.	Delaware
MLH Group Inc.[5]	Delaware
Merrill Lynch Corporate Pass-Through Securities, Inc, Inc.	Delaware
Merrill Lynch Insurance Group, Inc.	Delaware
Merrill Lynch Life Insurance Company	Arkansas
ML Life Insurance Company of NewYork	New York

[4] ML & Co. owns 100% of this corporation's outstanding common voting stock. 100% of the outstanding preferred voting stock is held by outside parties. The board of directors consist of 14 members, 12 of which are ML & Co. employees and 2 of which represent outside parties.

5 This corporation has over 30 direct or indirect subsidiaries operation in the United States and serving as either general partners or associate general partners of real estate limited partnerships.

Name	State or Jurisdiction of Entity
Merrill Lynch International Finance Corporation	New York
Merrill Lynch International Bank Limited	England
Merrill Lynch Bank (Suisse) S.A.	Switzerland
Merrill Lynch Trust Company (Jersey) Limited	Jersey, Channel Island
Merrill Lynch L.P. Holdings, Inc.	Delaware
Merrill Lynch MBP. Inc.	Delaware
Merrill Lynch National Financial	Utah
Merrill Lynch Private Capital Inc.[6]	Delaware
Merrill Lynch Trust Company[7]	New Jersey
Merrill Lynch Business Financial Services, Inc.	Delaware
Merrill Lynch Credit Corporation	Delaware
Merrill Lynch Home Equity Acceptance, Inc.	Delaware
Merrill Lynch/WFC/L, Inc.	New York
ML Futures Investment Partners Inc.	Delaware
ML IBK Positions Inc.	Delaware
Merrill Lynch Interfunding Inc.[8]	Delaware

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[6] This corporation has 16 subsidiaries which have engaged in direct principal lending and investment management.

[7] This corporation has 4 affiliates that are engaged in trust activities.

[8] This company has 10 subsidiaries holding or having a direct or indirect interest in specific investments on its behalf.

Name	State or Jurisdiction of Entity
ML Leasing Equipment Corp.[9]	Delaware
Merlease Leasing Corp.	Delaware
Merrill Lynch Venture Capital Inc.	Delaware
Princeton Services, Inc.[10]	Delaware
Merrill Lynch International Incorporated	Delaware
Merrill Lynch GFX, Inc.	Delaware
Merrill Lynch International (Australia) Limited	New South Wales
Merrill Lynch International Bank	United States
Merrill Lynch International Holdings Inc.	Delaware
Merrill Lynch Bank (Austria) Aktlengesellschaft A.G.	Austria
Merrill Lynch Bank and Trust Company (Cayman) Limited	Cayman Islands, British West Indies
Merrill Lynch International & Co.[11]	Netherlands Antilles
Merrill Lynch Capital Markets A.G.	Switzerland
Merrill Lynch Europe Limited	England
Merrill Lynch International Limited	England
Merrill Lynch Limited	England

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[9] This corporation has over 45 direct or indirect subsidiaries operating in the United States and serving as either general partners or associate general partners of real estate limited partnerships.

[10] This corporation is the general partner of Merrill Lynch Asset Management, L.P. (whose co-limited partners are ML & Co. and indirect subsidiary of ML & Co.)

[11] A partnership among subsidiaries of ML & Co.

Name	State or Jurisdiction of Entity
Merrill Lynch, Pierce, Fenner & Smith (Brokers & Dealers) Limited	England
Merrill Lynch Europe Ltd.	Cayman Islands, British West Indies
Merrill Lynch Holding GmbH[12]	Fed. Rep. of Germany
Merrill Lynch Bank A.G.	Fed. Rep. of Germany
Merrill Lynch GmbH	Fed. Rep. of Germany
Merrill Lynch Holding S.A.F.	France
Merrill Lynch Capital Markets (France) S.A.	France
Merrill Lynch Hong Kong Securities Limited	Hong Kong
Merrill Lynch Japan Incorporated	Delaware
Merrill Lynch Specialists Inc.	Delaware
Merrill Lynch Canada Investments Ltd.	Ontario
Merrill Lynch Life Agency Inc. (Arizona)	Arizona
Merrill Lynch Life Agency Inc. (Arkansas)	Arkansas
Merrill Lynch Life Agency Inc. (Idaho)	Idaho
Merrill Lynch Life Agency Inc. (Illinois)	Illinois
Merrill Lynch Life Agency Inc. (Massachusetts)	Massachusetts
Merrill Lynch Life Agency Inc. (Montana)	Montana
Merrill Lynch Life Agency Inc. (New Mexico)	New Mexico

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[12] ML & Co. holds a 50% interest in this corporation, with the remaing 50% interest held by an outside party.

Name	State or Jurisdiction of Entity
Merrill Lynch Life Agency Inc. (Ohio)[13]	Ohio
Merrill Lynch Life Agency Inc. (Oklahoma)[14]	Oklahoma
Merrill Lynch Life Agency Inc. (Puerto Rico)	Puerto Rico
Merrill Lynch Life Agency Inc. (South Dakota)	South Dakota
Merrill Lynch Life Agency Inc. (Virgin Islands)	Virgin Islands
Merrill Lynch Life Agency Inc. (Washington)	Washington
Merrill Lynch Life Agency Inc. (Alabama)	Alabama
Merrill Lynch Life Agency of Maine, Inc.	Maine
Merrill Lynch Settlement Services, Inc. (Florida)	Florida
Merrill Lynch Life Agency Ltd. (Mississippi)[15]	Mississippi
Merrill Lynch-Nomura Management Company, Inc.[16]	Delaware

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[13] 100% of Class A (non-voting) Common Stock owned by Merrill Lynch, Pierce, Fenner & Smith Incorporated and 100% Class B (voting) Common Stock held in the name of 1 individual.

[14] 100% owned by Merrill Lynch Life Agency, an Oklahoma partnership, in which Merrill Lynch, Pierce, Fenner & Smith Incorporated has a 99.8% interest.

[15] 100% of stock is held by three individuals.

[16] 50% owned by Merrill Lynch, Pierce, Fenner & Smith Incorporated. 30% owned by Nomura Securities and 20% owned by Nomura Securities International, Inc.

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TREATISE

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No. 94-_____

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PETITION FOR WRIT OF CERTIORARI

Citation to Decision

The decision below is in a case in the New York Court of Appeals entitled *In the matter of Merrill Lynch, Pierce, Fenner & Smith, Inc. and John R. DaCamara v. Manhard*, ___ N.Y.2d ___, ___ N.Y.S.2d ___ (1995). The decision in this case was rendered on February 21, 1995 (Appendix "A", infra).

Jurisdictional Statement

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

Constitutional Provisions, Treaties and Statutes to be Included

9 U.S.C. § 1 et seq. (Federal Arbitration Act", or "FAA") New York Civil Practice Laws and Rules 7502 and 7503.

Statement of the Case

Petitioner Margaret A. Manhard is an aggrieved former customer of Respondent Merrill Lynch. Her broker at Merrill Lynch was John R. DaCamara. On August 18, 1992, Mrs. Manhard filed an arbitration before the National Association of Securities Dealers ("NASD") against Merrill Lynch and Mr. DaCamara.

Mrs. Manhard is 77 years old. She is a resident of McLean, Virginia, and she did business with DaCamara at a Virginia branch of Merrill Lynch. The controversy between her and Merrill Lynch and DaCamara arises out of allegations of the fraudulent and unsuitable sale of certain securities (options and limited partnerships) to her by them. The arbitration statement of claim alleges damages in excess of one million dollars.

In 1992, Merrill Lynch and DaCamara commenced a "special proceeding" seeking a stay of arbitration on the ground that the statute of limitations had run on Mrs. Manhard's claims.[1] The Supreme Court of New York ruled that the statute of limitations question was a matter for the court not the arbitrator, and it then granted the petition to stay arbitration on the ground that Mrs. Manhard's claims indeed were barred by the statute of limitations.

The intermediate-level Appellate Division reversed the New York Supreme Court's decision, holding that, under the Federal Arbitration Act (hereinafter referred to as the "FAA") the issue of whether Mrs. Manhard's claims were barred by the statute of limitations was a matter for the arbitrators and not for the court. The Appellate Division's decision is reported at 201 A.D.2d 347, 607 N.Y.S.2d 640 (1st Dept. 1994). (Appendix A, infra, page 17 - A).

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[1] The Petition also sought a stay of the arbitration as to investments that were more than six years old, asserting that those claims were "ineligible" for arbitration under the rules of the NASD. The trial court stayed those claims, and the intermediate appellate court affirmed. The New York Court of Appeals was not asked to consider that issue, and Mrs. Manhard does not here contest the propriety of that specific relief.

The reversal was based upon the court's previous ruling in *Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 198 A.D.2d 87, 605 N.Y.S.2d 838 (1st Dept. 1993).[2] In ruling that the limitations issue was for the arbitrators rather than the court, the Appellate Division wrote:

> The parties' intention to resolve all disputes by arbitration is made clear by the agreement to arbitrate. In such circumstances, the policy of the Federal Arbitration Act requires that the applicability of a statute of limitations be decided by the arbitrators. [citation omitted]

The New York Court of Appeals reversed. The Court conceded that, "in the absence of an explicit choice of law provision, [the FAA] would have precluded the courts . . . from addressing the Statute of Limitations issue. [citation omitted]."[3] slip op., at 10. The Court, however, determined that the parties had explicitly agreed to abide by New York's procedural rules governing arbitration, and that, under this Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), the New York arbitration law containing a procedure whereby the statute of limitations questions are removed from the arbitrators was part of the contract and, despite the applicability of the FAA, the New York procedure should prevail.

In so ruling, the Court of Appeals relied on the language of the New York choice-of-law clause in the contract. That clause provided that "the agreement and its enforcement" would be governed by New York law. Relying, in part, on the now-

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[2] Both cases (the instant one as well as *Luckie*) were reversed by the New York Court of Appeals in a joint opinion. The aggrieved party in *Luckie*, however, is not joined in this Petition.

[3] Both sides agreed that the arbitration involved "commerce" and that thus the FAA applies to the case.

discredited lower court decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 20 F.3d 713 (7th Cir. 1994), reversed, ___ U.S. ___, 1995 WL 86555, the Court of Appeals wrote: "when the parties chose to apply New York law, 'without excluding its arbitration rules' from that general condition, the parties adopted as binding New York's rule that threshold Statute of Limitations questions are for the courts." slip op., at 11. In so ruling, the New York Court of Appeals expressly declined to follow the decision of the United States Court of Appeals for the Second Circuit in *Shearson Lehman Inc. v. Wagoner*, 944 F.2d 114 (2nd Cir. 1991), which reached a diametrically opposite result on virtually identical facts.

Argument

1. The New York Court of Appeals' Decision to Apply New York Arbitration Law Violates A Fundamental Policy of the Federal Arbitration Act

In *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, this Court wrote that "*as a matter of federal law*, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of *waiver, delay, or a like defense to arbitrability*," 460 U.S. 1, 24-25, 103 S.Ct. 925, 941-42, 75 L.Ed.2d 765 (1983)(underscoring added). The Court of Appeals violated this fundamental federal rule of construction by holding that the language of the choice-of-law provision in this case was sufficient to overcome the "rule of doubt" expressed in *Moses H. Cone*.

The week following the Court of Appeals decision in the instant case, this Court decided *Mastrobuono v Shearson Lehman Hutton, Inc.*, ___U.S.___, 1995 WL 86555. Like the instant cases, *Mastrobuono* concerned the issue of the applicability of New York's arbitration law to the relationship between a public investor and a stock brokerage firm. In the instant case

and in *Mastrobuono*, the brokerage firm claimed that it was not required to arbitrate certain issues (in *Mastrobuono* punitive damages, in the instant cases, limitations) in spite of the fact that the investor had properly demanded arbitration of "all controversies."

In *Mastrobuono*, this Court held that the New York choice-of-law provision in the agreement between the parties "is not, in itself, an unequivocal exclusion of punitive damages claims." *Id.* at 4. The choice-of-law clause was thus insufficient to invoke New York's arbitration law, and was thus confined to determining the substantive rules to be applied to the parties' conduct.

The New York Court of Appeals' decision in this case is in clear violation of this standard, *i.e.* that in order to invoke New York's arbitration law, the contract must contain an "unequivocal" expression of such an intention.[4] On no realistic view of the facts can the agreement in this case be so construed.[5]

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[4] Indeed, the Court of Appeals wrote that the appropriate standard required the parties expressly to exclude New York's arbitration law from the ambit of their agreement if a contrary result was to be reached. In so ruling, the Court of Appeals approached the entire problem from the wrong end, and thus reached a result inconsistent with the dictates of *Mastrobuono*.

[5] In construing the choice-of-law clause in *Mastrobuono*, this Court wrote:

> [R]espondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it . . . [citations omitted]. Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result. That rationale is well-suited to the facts of this case. As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right.

It must be conceded that there are slight differences between the standard-form agreement at issue in *Mastrobuono* and the one involved here. In this case, the choice-of-law clause provides that New York law shall govern "the agreement and its enforcement," while in *Mastrobuono*, it provided that the "agreement shall be governed by the law of the State of New York." The difference in the contract language, *i.e.* the three words "and its enforcement," cannot realistically be deemed sufficient to change the outcome under the "unambiguous" test of *Mastrobuono*. These three words cannot realistically be held, in accordance with *Mastrobuono*, to evince an intention by the parties to commit limitations questions to the courts, when without them, no such intent would be implied.[6]

> In the face of such doubt, we are unwilling to impute this intent to petitioners. . . .
>
> Finally, the respondents' reading of the two clauses violates another cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other . . . [citations omitted]. We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading sets up the two clauses in conflict with one another: one foreclosing punitive damages, the other allowing them. This interpretation is untenable.

Id. at 5. It is submitted that, because of the rule of *Moses H. Cone*, these "common law" principles, as expressed and applied in *Mastrobuono*, are binding on the New York Court of Appeals as a matter of federal law.

[6] Put another way, the consumer in this case is no more cognizant of New York's "bifurcated approach to [statute of limitations]" than it was (in *Mastrobuono*) to New York's "bifurcated approach to punitive damages." For this reason, the three words "and its enforcement" contained in the agreement cannot logically support a different result.

Simply put, the clause that New York law governs the enforceability of the agreement between these parties was not clearly intended to affect, indeed limit, arbitration rights. Like the clause in *Mastrobuono*, the choice-of-law clause here does not state with sufficient clarity (*i.e.*, "unequivocally") that the parties intended to litigate limitations defenses. Thus, the words "and its enforcement," as they appear in the agreement at issue here, can easily be seen to have meanings other than the one ascribed to the parties by the Court of Appeals. For example, the words "and its enforcement" could mean that:

a. the security interests that attach through the margin agreement are subject to New York's self-help rules upon default;

b. issues of contract enforcement that arise regarding, *inter alia*, capacity of parties (including the enforceability and legal effect of the representation as to the majority status of the investor), are subject to New York law;

c. issues of contract enforcement in cases of impossibility and\or frustration of purpose, as they are affected by the "Acts of God" clause in the contract, will be governed by New York law;

Furthermore, Merrill Lynch cannot realistically be understood consciously to have decided to use the words "and its enforcement" in order to guarantee it a courtroom venue for limitations defenses. No proof exists that these three words were designed to reserve limitations questions to the courts. Indeed, at the time the agreements were signed, New York law was clear that, notwithstanding the CPLR, limitations was a question for the arbitrators in a case governed by the FAA. See *Cone Mills Corp. v. August F. Nielsen Co.*, 90 A.D.2d 31, 455 N.Y.S.2d 625 (1st Dept. 1982); *Caudill v. Board of Ed.*, 47 A.D.2d 610, 364 N.Y.S.2d 7 (1st Dept. 1975); *Conticommodity Service v. Philipp & Lion*, 613 F.2d 1222, 1224-25 (2nd Cir. 1980).

d. issues of the enforceability of alleged additional subsequent or contemporaneous oral contract terms (the parol evidence rule), will be governed by New York's (somewhat unique) interpretation of that rule; and

e. issues of enforcement raised by the requirement that the subject matter of an agreement be lawful, including the law of unconscionability, will be governed by New York law.

That these other interpretations exist demonstrates that the words "and its enforcement" do not "unambiguously" apply a limitation on the very broad arbitration clause. Indeed, the "GOVERNING LAW" provision of the agreement here is contained in a paragraph separate from the arbitration provision; in *Mastrobuono*, by contrast, it was contained in the same paragraph as the arbitration provision.

For these reasons, this Court should consider whether the New York Court of Appeals' decision in the case at bar violates fundamental federal policies expressed in the FAA and *Moses H. Cone*.

2. New York Civil Practice Laws and Rules 7503 is Pre-Empted by the Federal Arbitration Act Because It Is Manifestly in Derogation of Arbitration

In *Volt*, *supra*, this Court, describing the purpose of the FAA, wrote that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules," such as those in California. 488 U.S. at 477. Nevertheless, before this Court upheld enforcement of the California rules governing arbitration procedure, this Court reviewed the (California) law at issue and determined that those rules did not offend the FAA because they were "manifestly designed to encourage resort to the arbitral process." *Id.* at 476.

In the footnote accompanying that determination, this Court explained that the California procedural law at issue in *Volt*:

> generally foster[s] the federal policy favoring arbitration, [because it addresses] the special practical problems that arise in multiparty contract disputes when some but not all of the contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments.

Id. at n.5.

The same is clearly not true of the New York CPLR provision authorizing courts to determine limitations questions. Unlike the California law in *Volt*, the New York procedural law authorizing judicial determination of limitations issues is **not** an example of a state "taking the lead in fashioning a legislative response" to a practical problem; rather, the provision is the last hold-over from a time when private agreements to arbitrate were disfavored and were unenforceable. See generally, D.Siegel, *New York Practice*, 2nd ed., at 931 (explaining that the CPLR provisions on arbitration were first enacted in 1921, and remain basically unchanged since that time).[7]

New York's procedural law which provides that, notwithstanding the broadest of arbitration clauses, statute of limitations questions are for the courts not the arbitrators is manifestly in derogation of arbitration, especially when compared to the state law involved in *Volt*, which was "manifestly designed to encourage resort to the arbitral process." *Id.* at 476.

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[7] It is ironic that New York's arbitration law is often described as the model for the federal Act. See, e.g. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n.13 (1967). The irony, of course, is that the FAA contains no provision analogous to CPLR 7503's "timeliness" provision.

As such, New York's procedural law is pre-empted by the fundamental pro-arbitration policy of the FAA. The New York approach to the "who decides limitations" question will discourage resort to arbitration by making arbitration more cumbersome, time-consuming and expensive.

Thus, in her separate concurrence in the case at bar, Chief Judge Judith Kaye notes the troubling "practical effect" of the Court of Appeals' decision requiring Mrs. Manhard to "litigate [Merrill Lynch's] statute of limitations defenses in New York state courts before ever reaching the arbitrators' door." Chief Judge Kaye wrote separately because of her "fear [for] what may be the continuing erosion of the pro-arbitration policy originally expressed by Congress in the [FAA]." This Court can signal a halt to this perception of erosion by granting the instant Petition and reversing the New York Court of Appeals' decision.

In *Volt*, this Court wrote:

> [E]ven when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law - that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L.Ed. 581, 61 S.Ct. 399 (1941).

Id. at 477. To the extent that Congress, in enacting the FAA, sought, even secondarily (1) to encourage resort to arbitration, and/or (2) to prevent the states from passing laws in derogation of arbitration, the Court of Appeals' decision conflicts with the "accomplishment and execution of the full purposes and objectives of Congress." (underscoring added).

For this reason, this Court should review the Court of Appeals' decision to determine whether CPLR 7503 is preempted by the FAA.

Conclusion

For the reasons here stated, this Court should grant the instant Petition.

Respectfully submitted,

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May 19, 1995

State of New York Court of Appeals

No. 11

In the Matter of Smith Barney, Harris Upham & Co., Inc.,
Appellant,

v.

Charlie Luckie, Jr., et al., and Doris Kahn,
Respondents.

No. 13

In the Matter of Merrill Lynch,
Pierce, Fenner & Smith, Inc. et al.,
Appellants,

v.

Margaret B. Manhard,
Respondent.

No. 11:
Lawrence E. Fenster, for appellant.
Seth E. Lipners, for respondent Kahn.

No. 13:
Lawrence E. Fenster, for appellants.
Michael J. Goergen, for respondent.

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports

TITONE, J.:

These two appeals arise from controversies concerning separate securities transactions undertaken by two securities

brokers on behalf of two unrelated investors. The common issue presented is whether the Appellate Division in each case properly held that the timeliness of claims sought to be arbitrated pursuant to an agreement governed by the Federal Arbitration Act (FAA) is a question reserved to the arbitrators, notwithstanding the facts that each arbitration agreement contained a New York choice of law provision, and that, under New York law, Statute of Limitations questions are properly resolved by the courts (*see*, CPLR 7502[b]). In light of the United States Supreme Court's decision in *Volt Info. Sciences v Board of Trustees of Leland Stanford Jr. Univ.* (489 US 468), we conclude that a determination by the court on the Statute of Limitations question offends neither the language of the FAA nor its underlying policies where the parties have mutually agreed that New York law shall govern the dispute. Accordingly, we reverse in each case and remit to the Appellate Division for a determination on the previously unaddressed Statute of Limitations questions.

I.

Smith Barney

In 1989, respondent Doris Kahn commenced arbitration against petitioner Smith Barney, Harris Upham & Co.,[1] a national securities broker-dealer having its principal executive offices in New York, alleging federal and state claims of fraudulent and unsuitable sale of certain securities. Kahn, a Florida resident, made her Smith Barney investments exclusively through petitioner's Florida offices, and terminated her account with petitioner in or about August 1984.

The governing customer agreement between Smith Barney and Kahn refers to and incorporates a Securities Account Agreement, which in turn contains an arbitration clause. The parties' arbitration clause provides that "[a]ny controversy between

[1] Petitioner is now known as Smith Barney, Inc.

Smith Barney and [Kahn] arising out of or relating to this contract or the breach thereof shall be settled by arbitration" and specifies the available arbitration fora. The arbitration clause is directly followed in the Securities Account Agreement by a New York choice of law provision, which states that "[t]his agreement and its enforcement shall be governed by the laws of the State of New York."

The parties subsequently engaged in extensive state and federal litigation to determine both the appropriate forum for arbitrating their dispute (*see*, *Luckie v Smith Barney, Harris Upham & Co, Inc.*, 766 F. Supp. 1116 [M.D. Fla 1991], *affd* 999 F.2d 509) and whether the arbitration is barred by the Statute of Limitations. In 1989, by special proceeding, petitioner Smith Barney sought an order in New York Supreme Court staying the arbitration before the National Association of Securities Dealers (NASD)[2] pursuant to CPLR 7503 and moved to dismiss Kahn's claims pursuant to CPLR 7502(b) on the ground, among others, that they were time-barred. Supreme Court granted a temporary stay of arbitration pending determination of the petition. The court ultimately denied the petition for a stay, ruling that Kahn's claims were governed by New York's six-year Statute of Limitations for fraud, and were timely filed. The Appellate Division affirmed the denial of the stay of arbitration on different grounds. The court ruled that the Statute of Limitations question is one to be resolved by the arbitrators rather than the courts. Relying on the fact that "[t]he parties' intention to resolve all disputes by arbitration [was] clear," the court reasoned that "dismissal of respondent's claims pursuant to CPLR 7502(b) would defeat the policies of the Federal Arbitration Act." Thus, the court concluded that "arbitrators should decide the Statute

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[2] As directed by the 11th Circuit Court of Appeals, respondent pursued her arbitration claims before the NASD (*see*, *Luckie v Smith Barney, Harris Upham, & Co.*, 999 F.2d 509 [11th Cir. 1993]). Arbitration was held in the fall of 1994, and respondent was awarded $360,098.62 plus costs.

of Limitations issue, including whether New York or Florida law applies." This Court granted Smith Barney's motion for leave to appeal, but denied its motion for a stay of arbitration pending resolution of this appeal.

Merrill Lynch

In August 1992, respondent Margaret B. Manhard filed a claim in arbitration before the NASD in New York against petitioners Merrill Lynch, Pierce Fenner & Smith, Inc., a national securities broker-dealer having its principal place of business in New York, and John R. DaCamara, a Merrill Lynch employee. Manhard alleged various federal and state claims against petitioners arising out of certain investments made by Merrill Lynch on her behalf.

Arbitration was commenced in accordance with the terms of a customer agreement Manhard executed with Merrill Lynch. As in *Smith Barney*, the agreement provided that any controversy arising from the contract shall be settled by arbitration, and included a choice of law provision stating that "[t]his agreement and its enforcement shall be governed by the laws of the State of New York."

On October 1, 1992, petitioners commenced this special proceeding in Supreme Court to permanently stay arbitration pursuant to CPLR 7502 and 7503(b). Supreme Court granted petitioners a temporary stay of the arbitration pending a hearing on the petition. The petition contained allegations that all of Manhard's claims were either ineligible for submission to arbitration under NASD Code of Arbitration § 15 — which precludes arbitration of claims based on transactions occurring

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[3] CPLR § 202 provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

more than six years prior to commencement of the arbitration — or were time-barred by applicable federal or state Statutes of Limitations. Petitioners also argued that New York's borrowing statute — CPLR 202[3] — required that the shorter of either New York's or Virginia's Statutes of Limitations applied. Thereafter, Manhard's counsel conceded that all claims based upon transactions in her account that occurred more than six years prior to commencement of the arbitration were ineligible for arbitration, but maintained that the timeliness of her remaining claims was an issue reserved for the arbitrators. Manhard additionally argued that the New York borrowing statute was not an available bar to her claims because they "accrued" not in Virginia, the place of economic injury, but in New York, where the claim for arbitration was filed.

Supreme Court granted the petition and permanently stayed the arbitration. The court ruled that pursuant to New York law, the court was the proper forum to decide whether the claims were time-barred from arbitration. The court then determined that New York's borrowing statute applied, found that Manhard's claims accrued in Virginia — the place of her economic loss — and held that the remaining claims were all time-barred.

The Appellate Division affirmed so much of Supreme Court's order holding that claims based on transactions occurring more than six years prior to the filing were ineligible for arbitration pursuant to NASD rules and should be permanently stayed. However, the court reversed on the Statute of Limitations issue, holding that because the parties made clear their intent to resolve all disputes by arbitration, "the policy of the Federal Arbitration Act requires that the applicability of a Statute of Limitations be decided by the arbitrators." We granted Merrill Lynch's motion for leave to appeal, and granted their motion for a temporary stay of the Appellate Division order pending resolution of the appeal.

II

The Federal Arbitration Act (9 USC §§ 1-16) specifies that a written provision to arbitrate any controversy arising out of a "contract evidencing a transaction involving commerce" is valid and enforceable (*see, id.* § 2).[4] The Act was designed to terminate "the judiciary's longstanding refusal to enforce agreements to arbitrate" (*Dean Witter Reynolds Inc. v Byrd*, 470 US 213, 219-220). In enacting the FAA, Congress established a federal policy favoring arbitration agreements, which is to be advanced by rigorous judicial enforcement of arbitration agreements (*Shearson/American Exp., Inc. v McMahon*, 482 US 220) and by resolution of any "ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration" (*Volt Info. Sciences v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 476; *Moses H. Cone Hosp. v Mercury Constr. Corp.*, 460 US 1, 24).

Notwithstanding the federal policy favoring liberal enforcement of agreements to arbitrate, the FAA should not be construed to "confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties] aqreement*'" (*Volt Info. Sciences v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US at 474-475, *supra*, *quoting* 9 USC § 4 [emphasis added by Court]). In other words, in

[4] Section 2 of the FAA, entitled "Validity, irrevocability, and enforcement of agreements to arbitrate," provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

recognition of the fact that arbitration is manifestly a matter of contract, and that parties to an arbitration agreement — like all contracting parties — are free to select the terms under which they will arbitrate, the policy established by the FAA is to ensure that private agreements to arbitrate are enforced according to their terms *(id.*, at 476). Accordingly, the parties are at liberty to include a choice of law provision in their agreement, and the parties' choice will be honored unless the chosen law creates a conflict with the terms of, or policies underlying, the FAA *(id.)*.

The parties to each of the appeals before us do not dispute that the customer agreements governing the securities transactions at issue are contracts "involving commerce"[5] within the realm of the FAA (*see*, *Corey v New York Stock Exchange*, 493 F. Supp. 51, *affd* 691 F.2d 1205, 1210 [6th Cir 1982]). The question we must resolve is whether New York arbitration law conflicts with the FAA on the question of the arbitrability of these Statute of Limitations disputes such that its application must be preempted.

Generally, under New York statutory and case law, a court may address three threshold questions on a motion to compel or to stay arbitration: (1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State court (*see*, CPLR 7502[b]; 7503; *Matter of County of Rockland*, 51 NY2d 1, 9 n.2). Clearly, under New York law, *statutory* time limitations questions such as those presented on these two appeals —

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[5] The commercial transactions subject to the FAA's dictates are defined in section 1 of that act as:

> commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation. . . .

as opposed to *contractual* time limitations agreed upon by the parties — are for the courts, not the arbitrators (*see*, *Rockland*, 51 NY2d at 9, *supra*).

Undeniably, in the absence of an explicit choice of law provision, governing federal law would have precluded the courts in the appeals before us from addressing the Statute of Limitations issue (*see*, *Conticommodity Serv. v Philipp & Lion*, 613 F.2d 1222, 1224-1225 [2d Cir 1980]) or from issuing stays under our arbitration act (*see*, *Matter of Rederi*, 25 NY2d 576, 585). However, the parties' choice that New York law would govern "the agreement *and its enforcement*" indicates their "intention to arbitrate to the extent permitted or authorized by [this State's] law," even if application of the State law — and an adverse ruling on a Statute of Limitations claim — would relieve the parties of their responsibility under the contract to arbitrate (*Armco Steel Co. v CSX Corp.*, 790 F. Supp. 311, 318 [DDC 1991]; *see also Saturn Distrib. Corp. v Williams*, 905 F.2d 719 [4th Cir 1990] [parties are entitled to incorporate state law restrictions into their arbitration agreement that would otherwise be preempted by the FAA], *cert denied*, 498 US 983; *Flight Svstems v Paul A. Laurence Co.*, 715 F. Supp 1125 [DDC 1989]). Although the parties broadly agreed to arbitrate "any controversy" arising from the customer agreements, that clause — like all other provisions in the contract — was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning not only the agreement, but more critically, its enforcement. Accordingly, we conclude that under this agreement the parties agreed to refer questions of timeliness to the courts by incorporating New York law. In other words, when the parties chose to apply New York law, "without excluding its arbitration rules" from that general condition (*Mastrobuono v Shearson Lehman Hutton, Inc.*, 20 F.3d 713, 717 [7th Cir 1994], *cert granted*, 115 S Ct 305), the parties adopted as binding New York's rule that threshold Statute of Limitations questions are for the courts.

In light of our conclusion that the parties intended that New York law govern the arbitration, the dispositive question for resolution of these appeals becomes whether, under standard federal preemption analysis, the Federal Arbitration Act's compulsory arbitration provisions and its underlying policies require that even those questions normally reserved to the courts pursuant to New York law must be resolved by the arbitrators, notwithstanding the presence of a New York choice of law provision in the agreement to arbitrate.

First, the provisions of CPLR § 7502[b][6] and § 7503[7] authorizing the courts to consider a time limitation asserted as a

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[6] CPLR § 7502(b), entitled "Limitation of time", provides:

> If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court * * *. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. * * * * .

[7] CPLR § 7503(a), entitled "Application to compel arbitration; stay of action", provides:

> A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision [b] of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

[8] FAA § 3 provides for a judicial stay of court proceedings "brought in any of the courts of the United States" where an issue raised therein is

bar to arbitration in connection with an application to compel or stay arbitration do not expressly conflict with any provision of the FAA (*see*, 9 USC §§ 1-16).[8] Additionally, Congress did not intend "to occupy the entire field of arbitration in enacting this statutory scheme" (*Volt Info. Sciences v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 477, *supra*). In the absence of any express conflict between the provisions of the FAA and New York's arbitration law or some express congressional intent to occupy the entire field of arbitration in commercial disputes, the FAA will be found to preempt state law only to the extent that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*id.*, at 477, *quoting Hines v Davidowitz*, 312 US 52, 67). Accordingly, the dispositive inquiry before us is whether application of New York arbitration law in this context "undermine[s] the goals and policies of the FAA" (*id.*, at 478). We conclude that it does not.

Our point of departure on this aspect of the preemption analysis is the United States Supreme Court's decision in *Volt Info. Sciences v Board of Trustees of Leland Stanford Jr. Univ.* (489 US 468, *supra*). In *Volt*, the Supreme Court held that a California statute permitting a court to stay arbitration pending resolution of related litigation was not preempted by the FAA where the parties included a clause in their arbitration agreement stating that the agreement will be governed by California law. The Court first concluded that it would not disturb the California Court of Appeal's conclusion that the parties had incorporated

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referable to arbitration. Additionally, section 4 of the Act authorizes "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court for an order directing that such arbitration proceed *in the manner provided for in such agreement*" (9 USC § 4 [emphasis supplied]). These sections generally provide tools to enforce arbitration agreements and do not purport to circumscribe the issues that a state court may consider in staying or compelling arbitration where the parties' agreement contemplates that its enforcement will be governed by the law of a particular state.

California's arbitration rules into their agreement, since the interpretation of a private contract is "ordinarily a question of state law" (*id.*, at 474). The Court next concluded that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate" (*id.*, at 476). The Court went on to note that "[i]nterpreting a choice of law clause to make applicable state rules governing the conduct of arbitration — rules which are manifestly designed to encourage resort to the arbitration process — simply does not offend the rule of liberal construction set forth in *Moses H. Cone* [460 US 1, *supra*], nor does it offend any other policy embodied in the FAA" (*id.*).

Turning its focus to preemption, the Supreme Court addressed whether the state law, which authorized a stay of arbitration where no federal counterpart was available, created a conflict with federal law which "would undermine the goals and policies of the FAA" (*id.*, at 478). Concluding that it would not, the Court reasoned that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms" (*id.*). Applying ordinary contract principles, the Court concluded that parties are not only free to limit by agreement the issues to be arbitrated, but also to "specify by contract the rules under which that arbitration will be conducted" (*id.*, at 479). Finally, in key language, the Court explained that where "the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, *even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward*" (*id.*).

In the aftermath of *Volt*, the courts have divided on whether New York's rule permitting the court to address a statute of limitations question conflicts with the compulsory arbitration provisions of the FAA and is thus preempted (*compare Chemi-*

cal Futures & Options, Inc. v Resolution Trust Corp., 832 F. Supp 1188, 1194 [N.D. Ill 1993] [New York choice of law clause in arbitration agreement makes state arbitration rules applicable; under New York law, courts, not arbitrators, decide Statute of Limitations questions]; *Seabord Surety Co. v Cates*, 604 So.2d 570 [Fla Dist Ct. App 1992] [same] *with Merrill Lynch, Pierce, Fenner & Smith, Inc. v Shaddock*, 822 F. Supp. 125 [S.D.N.Y. 1993] [time-bar defenses are for arbitrators, despite New York choice of law clause]: *Merrill Lynch, Pierce, Fenner & Smith Inc. v Gregg*, 1993 WL 616691 [M.D. Fla 1993] [same]; *Victor v Dean Witter Reynolds*, 606 So.2d 681 [Fla 5th Dist Ct. App. 1992] [same], *review denied*, 614 So. 2d 502 [Fla. 1993]). Those courts opting for preemption generally rely on *Shearson Lehman Hutton, Inc. v Wagoner* (944 F.2d 114 [1991]). We are not persuaded by the *Wagoner* Court's analysis, however, which did not cite or address the significance of the previously decided *Volt* case, and instead relied on two pre-*Volt* precedents which, critically, lack any reference to a contractual choice of law provision (*Conticommodity Serv. v Philipp & Lion*, 613 F.2d 1222, 1224-1225 [2d Cir 1980], *supra*; *Reconstruction Fin. Corp. v Harrisons & Crosfield Ltd*, 204 F.2d 366 [2d Cir] *cert denied*, 346 US 854 [1953]). Indeed, one of those cases, *Conticommodity*, involved the very different situation where the time limitation was contained within the body of the contract — a matter for the arbitrator even under New York law (*see, Matter of County of Rockland*, 51 NY2d 1, *supra*).

In contrast to *Wagoner* and its progeny, we conclude that this State's body of arbitration law — including the rule that courts may consider threshold Statute of Limitations claims — is not inimical to the policies of the FAA. Significantly, the FAA was modeled after New York's arbitration law (*see, Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 US 395, 405, n.13; *Weinrott v Carp*, 32 NY2d 190, 198-99). Accordingly, no significant distinction can be drawn between the policies sup-

porting the FAA and the arbitration provisions of the CPLR. New York's rule permitting the courts to address Statute of Limitations defenses to arbitration where the parties so choose in no way interferes with the parties' contractual freedom to choose arbitration or even to choose arbitration "under applicable state rules" — the overarching goal of the FAA (*Empire Blue Cross and Blue Shield v Janet Greeson's A Place for Us, Inc.*, 985 F.2d 459, 462 [9th Cir 1993]). In fact, by honoring the parties' selection of New York law to govern their agreement and its enforcement, our holding advances the federal policy of "ensur[ing] the enforceability according to their terms, of private agreements to arbitrate" (*Volt*, 489 US, at 476, *supra*).

Both sets of petitioners attempt to distinguish *Volt* on the grounds that the California law at issue there merely permitted imposition of a temporary stay of the arbitration, while an adverse ruling on the Statute of Limitations issue by the courts in these cases would result in a permanent stay of arbitration. That interpretation of the Supreme Court precedent is belied by the unqualified conclusion reached by the court that enforcing state rules of arbitration "according to the terms of the agreement is fully consistent with the goals of the FAA, *even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward*" (*id.*, at 479). Contrary to petitioners' position, the Supreme Court did not rest its decision on the fact that the court-issued stay in *Volt* was only temporary. Indeed, the Court consistently referred to the entire body of California's statutory arbitration rules, and concluded without circumscription that "state rules of arbitration" may be incorporated into an agreement to arbitrate without offending the policies underlying the FAA (*id.*). Accordingly, the potential permanency of the stay granted pursuant to New York law does not alter our conclusion that application of New York law to permit court determination of statutory timeliness issues does not conflict with the underlying policies of the FAA.

III

When making a threshold statute of limitations determination under New York law, the courts must apply the same period of limitations in arbitration that would govern if an action were brought on the claim being arbitrated (*Matter of SCM Corp. [Fisher Park Lane Co.]*, 40 NY2d 788). Under the New York borrowing statute (CPLR § 202), a securities fraud claim arising outside this State is subject to the limitations periods of the jurisdictions where the injury occurred — generally, the place where the investors resided and sustained the economic impact of the loss (*see, Dymm v Cahill*, 730 F. Supp. 1245 [S.D.N.Y. 1990]). In borrowing the foreign statute, "[a]ll the extensions and tolls applied in the foreign state must be imported with the foreign statutory period, so that the *entire* foreign statute of limitations applie[s], and not merely its period" (McLaughlin Practice Commentaries, CPLR § 202, McKinney's Consol Laws of NY, Book 7B, at 109 [emphasis in original]). Since the Appellate Division in each case before us did not address the Statute of Limitations arguments, including applicability of the borrowing statute, relevant accrual dates, tolls and extensions, by virtue of each panel's conclusion that the question was for the arbitrators, we remit in each case for such a determination.

Accordingly in each case, the order of the Appellate Division should be reversed, with costs, and each case remitted to the Appellate Division, First Department, for further proceedings in accordance with this opinion.

Smith Barney, Harris Upham & Co., Inc. v. Luckie, et al.
Merrill Lynch, Pierce, Fenner & Smith v Manhard

Nos. 11 & 13

KAYE, CHIEF JUDGE (concurring):

I concur in the Court's Opinion and conclusion that because the form arbitration agreements at issue plainly provide that New York law governs "the agreement *and its enforcement*," the parties can fairly be understood to have agreed that all of New York arbitration law (including the provisions of CPLR Article 75 which allow a party to first litigate statute of limitations issues in court) would apply. I write separately, however, to make two somewhat related points concerning what I fear may be the continuing erosion of the pro-arbitration policy originally expressed by Congress in the Federal Arbitration Act ("FAA").

First, I remain troubled by the practical effect for respondents—residents of the states of Florida and Virginia—who now have to litigate the brokerage firms' statute of limitations defenses in New York state court before ever reaching the arbitrators' door. Because of the Supreme Court's direction in *Volt Information Sciences v Bd. of Trustees of Leland Stanford Jr. Univ.* (489 US 468, 477) that "private arbitration agreements [be] enforced according to their terms," and the explicit terms of the agreements before us, however, I feel compelled to join the Court in reversing here.

Second, I think it useful to underscore the distinctly different interpretive choices made by the Court in this case and in *Salvano v Merrill Lynch, Pierce, Fenner & Smith* (___ NY2d ___, decided today).

In the present case, the Court concludes that the express language of the parties' agreements contemplated that the whole of New York arbitration law would apply, and following *Volt*, we give force to the parties' agreement. In *Salvano*, by contrast, the arbitration agreements and New York Stock Exchange rules are silent as to the availability of expedited arbitration. Nonetheless, the majority concludes that the parties, by their silence, implicitly agreed that an expedited process was not permissible and thus, the court lacked the authority to expedite the arbitration. As my dissent reflects, since the applicable agreements and rules in *Salvano* were silent as to the issue of expedition, it is incumbent upon the Court to vindicate the underlying policy of the FAA and affirm the issuance of an order expediting the arbitration during the pendency of the preliminary injunctions.

The difference between my vote to reverse in the present case and my dissenting vote to affirm in *Salvano* thus results from the difference between the agreements themselves.

* * *

Nos. 11 and 13: Order reversed, with costs, and case remitted to the Appellate Division, First Department, for further prodeedings in accordance with the opinion herein. Opinion by Judge Titone. Chief Judge Kaye and Judge Simons, Bellasosa, Smith and Ciparick concur, Chief Judge Kaye in a separate concurring opinion. Judge Levine took no part.

Decided February 21, 1995

Sullivan J.P., Carro, Ellerin, Rubin, JJ.

49936 In re Application of Merrill Lynch, Pierce, Fenner & Smith Inc. et al.,

Petitioners-Respondents,

For an order and judgment etc.,

against

Margaret B. Manhard,

Respondent-Appellant.

Order, Supreme Court, New York County (Joan Lobis, J.), entered January 12, 1993, which granted petitioners' motion for a permanent stay of arbitration, unanimously modified, on the law, to reverse insofar as the order stayed arbitration of claims which arose less than six years before the demand for arbitration was filed and to deny the motion as to those claims, and otherwise affirmed, without costs.

Arbitration was sought in this case pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers. Section 15 of that Code provides:

> No dispute, claim or controversy shall be eligible for submission to arbitration under the Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

It was within the court's province to determine the applicability of this rule to the within claims and stay arbitration of those claims which arose more than six years before the claims were submitted to arbitration. This rule is an eligibility requirement rather than a statute of limitation, and its applicability must therefore be determined by the court *Merrill Lynch, Pierce,*

Fenner & Smith v. DeChaine, ___ AD2d ___, 600 NYS2d 459, *Prudential Bache Securities v. Archard,* 179 AD2d 652, *lv denied* 80 NY2d 754). We therefore find that the IAS court properly stayed the arbitration of those claims which arose more than six years prior to their submission to arbitration.

However, as to the remaining claims, the IAS court incorrectly found that, under CPLR 7502 (b), the courts were also the proper forum for determining the applicable statute of limitations. The parties' intention to resolve all disputes by arbitration is made clear by the agreement to arbitrate. In such circumstances, the policy of the Federal Arbitration Act requires that the applicability of a statute of limitations be decided by the arbitrators (*see, Smith Barney Harris Upham & Co., Inc. v. Luckie*, AD2d, 1993 WL 476506).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED, February 15, 1994

/s/ Catherine O'Hagan Wolfe
Clerk

Supreme Court of the State of New York

County of New York: IAS Part 20

In the Matter of the Application of

MERRILL LYNCH PIERCE FENNER & SMITH INC. AND JOHN R. DACAMARA,

Petitioner,

against

Margaret A. Manhard,

Respondent

Index No. 25823/92
Decision and Order

Joan B. Lobis, J.S.C.

Petitioners have brought the present motion to stay the arbitration proceeding commenced by respondent before the National Association of Securities Dealers, inc., ("NASD") on the ground that the claims are time barred and not subject to arbitration. For the reasons stated below, petitioners' motion is granted and the arbitration is permanently stayed.

All of the respondent's claims with respect to transactions which occurred more than six years prior to respondent commencing the arbitration are ineligible for submission to arbitration under Section 15 of the NASD Code of Arbitration Procedure. That section provides that "no dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed form the occurrence or event giving rise to the act of the dispute, claim or controversy." Although there is little case law interpreting section 15 of the NASD Code of Arbitration Procedure, the Second Department has recently interpreted the section in question. *See Prudential, Bache Securities, et al., v. Archard, et al.*, 579

N.Y.S. 2d 890 (2d Dep't 1992). The court there permanently stayed the arbitration proceeding commenced by respondent claiming that she had been fraudulently induced to purchase various limited partnership interests on the ground that the action was commenced more than six years after respondent executed a subscription agreement to purchase the limited partnership interests. The Court held that "the claims asserted by the respondents arose more than six years prior to the commencement of the arbitration proceeding and are therefore time barred, and may not be submitted to arbitration with the NASD," Moreover, the federal courts have held that section 15 of the NASD Code is an eligibility requirement rather than a statute of limitations. *See, e.g., Paine Webber Inc., v. Farnam*, 370 F.2d 1286 (7th Cir. 1989). Section 15 therefore serves as an absolute bar to claims submitted for arbitration more than six years after the event which gave rise to the dispute." *Id.* Thus, any claim by respondent with respect to investments made six years prior to the commencement of the arbitration are ineligible for arbitration pursuant to section 15 of the NASD Code and should not be submitted for arbitration.

Any of respondent's remaining claims are barred by the applicable statute of limitations. Initially, this court holds that the borrowing statute codified in CPLR 202 is applicable in does not apply because the cause of action occurred in New York is rejected. The law in New York is that in a securities action, the cause of action accrues where the plaintiff suffers the loss and this "would be where they lived and conducted their investment activities." *Knierermen V. Bache Halsey*, 74 A.D.2d 290 (1st Dep't 1980).

Since the borrowing statute applies, the shorter of either state's statute of limitations is applicable in determining whether the claims are time barred. Under the relevant statute of limitations of New York and Virginia where respondent resides, all of the respondent's claims are barred by the shorter of the two

statutes. This court rejects respondent's argument that the Virginia statute of limitations based on a breach of a written contract is applicable. Respondent has failed to specify any written agreement that was breached.

There are two remaining issues to be addressed. First, this Court finds that petitioner's application to stay the arbitration is timely. Petitioners were not required to seek a stay of the arbitration within twenty after service of the demand for arbitration. The twenty day requirement of CPLR 7503(c) only applies where the party demanding arbitration serves a notice of intention to arbitrate which contains a provision expressly demanding that the other party move within the twenty days. Second, this Court rejects respondent's argument that the arbitrator should determine whether the claims are time barred. Under New York law, it is the Court rather than the arbitrator who initially determines whether the claims are time barred. *See* CPLR 7502 and 7503; *Marillo v. Shearson Hayden Stones, Inc.*, 159 A.D. 2d 1012, 552 N.Y.S. 2d 730 (4th Dept. 1990)

This constitute the decision and order of the court.

December 15, 1992

/s/ JBL
JOAN B. LOBIS, JSC

(2)

No. 94-1908

Supreme Court, U.S.
FILED
JUN 19 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARGARET B. MANHARD,

Petitioner,

—v.—

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and JOHN R. DACAMARA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

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June 19, 1995

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QUESTIONS PRESENTED

1. Whether this Court must defer to a decision of the New York Court of Appeals construing the terms of an arbitration agreement and a New York choice of law clause contained therein in accordance with general principles of contract construction under New York law?

2. Whether the Federal Arbitration Act requires enforcement of the terms of an arbitration agreement as determined by the highest court of the state whose law unequivocally applies to the construction and enforcement of the arbitration agreement?

3. Whether, assuming this Court can reach the issue, the New York Court of Appeals properly determined that the parties' contractual choice of New York law governing their arbitration agreement and its enforcement requires judicial determination of limitations defenses?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29 DISCLOSURE

All parties to the proceedings below appear in the caption of this case and, pursuant to Rule 14.1(b) of the Rules of the Supreme Court of the United States, need not be separately listed.

Pursuant to Rule 29.1, the following is a list of all parent and subsidiary corporations (except wholly owned subsidiaries) of respondent Merrill Lynch, Pierce, Fenner & Smith Inc.:

Merrill Lynch & Co., Inc.
Merrill Lynch Life Agency Inc. (Ohio)
Merrill Lynch Life Agency Inc. (Oklahoma)
Merrill Lynch Life Agency Ltd. (Mississippi)
Merrill Lynch-Nomura Management Company, Inc.
ML Life Agency Inc.

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OPINIONS BELOW

The decision of the New York Court of Appeals that gave rise to the instant petition for writ of certiorari is set forth in an opinion reported at *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manhard*, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308 (1995) (1-A).[1] The New York Court of Appeals rendered its decision after it granted leave to appeal from a decision and opinion of the New York Appellate Division, First Department, reported at *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manhard*, 201 A.D.2d 347, 607 N.Y.S.2d 640 (1st Dep't 1994). The opinion of the New York Supreme Court, New York County, that gave rise to the appeal to the Appellate Division was not reported.

JURISDICTION OF THIS COURT

The order and decision of the New York Court of Appeals sought to be reviewed was entered on February 21, 1995. The petition for writ of certiorari was filed on May 19, 1995, and was received by counsel for respondents on May 22, 1995. By a decision and order, dated June 7, 1995, the New York Court of Appeals denied reargument of its prior order and decision. (RA-1).

Petitioner contends that jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(a). As set forth in more detail below, respondents disagree. Respondents contend that there is no federal question—that is, this case does not call into question the validity of a federal statute or the validity of a

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[1] This case was reported with a companion case entitled *Smith Barney, Harris, Upham & Co. v. Luckie*, for which a petition for certiorari has not been filed. Although the *Luckie* caption appears first in the opinion of the Court below, to avoid confusion, the opinion of the Court below will be referred to herein as the *Manhard* opinion. Citations will include the appropriate reporters and reference to the relevant pages of the appendix to the petition for certiorari. Citations to pages of respondents' appendix will contain the prefix "RA."

state statute on the grounds that it is repugnant to the laws of the United States.

REASONS FOR DENYING PETITION

This case exclusively raises a question of contract construction under New York law that has already been ruled upon by the highest court of the State of New York. As such, this matter is not appropriate for review on certiorari from a state court of last resort. Since this case presents no federal question that needs resolution by this Court, certiorari should be denied.

This case involves the construction of an arbitration agreement. The two-step analysis required herein is simple. First, the terms of the parties' agreement must be determined in accordance with general principles of contract construction under state law. Second, the terms of that agreement must be enforced under the Federal Arbitration Act. Not once in the petition for certiorari, however, does petitioner address her central demand that this Court substantively review and reverse the New York Court of Appeals' construction of the arbitration agreement under state law principles, which "this Court does not sit to review." *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford, Jr. University*, 489 U.S. 468, 474 (1989).

Instead, petitioner avoids this fundamental issue, simply repeating the well-known presumptions and policies that favor arbitration under the FAA as if they were of talismanic significance—policies and presumptions explicitly recognized and followed by the New York Court of Appeals here. In so doing, petitioner fails to recognize that the Court of Appeals had no difficulty in interpreting the arbitration agreement herein, under applicable state law principles, to require judicial determination of limitations defenses. Under the FAA, the arbitration agreement must be enforced according to its terms, as construed by the New York Court of Appeals. *Id.*; *see First*

Options of Chicago v. Kaplan, No. 94-560, 63 U.S.L.W. 4459, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,728, 1995 WL 306184, at *4 (S. Ct. May 22, 1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1219 n.9 (1995).

Petitioner's strong reliance on this Court's recent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995), is also misplaced. *Mastrobuono* is simply a case in which this Court reviewed a decision from the United States Court of Appeals for the Seventh Circuit that construed a different arbitration agreement under state law to resolve an entirely different issue than the one present here. Unlike in *Mastrobuono*, however, this Court should defer to the decision of the highest court of the State of New York construing the very contract in question under New York law to determine the significance of a New York choice of law clause in that agreement.

As demonstrated below, with respect to the issue presented herein—application of a New York statute, pursuant to the parties' agreement, allowing judicial resolution of limitations defenses to arbitral claims—there is no federal question. The FAA and its underlying policies simply require enforcement of the parties' agreement. *See Volt*, 489 U.S. at 479 (indeed the contrary "result would be quite inimical to the FAA's *primary purpose* of ensuring that private agreements to arbitrate are enforced according to their terms" (emphasis added)). Accordingly, respondents respectfully submit that since this case presents no federal question that needs resolution by this Court, certiorari should be denied.

I. THIS COURT SHOULD DEFER TO THE NEW YORK COURT OF APPEALS' CONSTRUCTION OF PETITIONER'S ARBITRATION AGREEMENT

This Court has repeatedly stated that arbitration agreements simply are private contracts and ordinary state law principles of contract construction apply to their interpretation. *First Options of Chicago v. Kaplan*, 1995 WL 306184, at *4 (S. Ct.

May 22, 1995); *Mastrobuono*, 115 S. Ct. at 1219 n.9; *Volt*, 489 U.S. at 474. It is similarly well-settled that this Court ordinarily does not sit to review questions of contract construction under state law, including the construction of arbitration agreements. *Volt*, 489 U.S. at 474; *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 n.9 (1981).

In this case, the New York Court of Appeals did nothing more than interpret the arbitration agreement under state law. According to the Court of Appeals:

> Although the parties broadly agreed to arbitrate "any controversy" arising from the customer agreements, that clause—like all other provisions in the contract—was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning not only the agreement, but more critically, its enforcement. Accordingly, we conclude that under this agreement the parties agreed to refer questions of timeliness to the courts by incorporating New York law.

Manhard, 85 N.Y.2d at 202, 623 N.Y.S.2d at 805. (8-A).

Since the New York Court of Appeals found no ambiguity in the agreement, it was not obliged to construe the agreement "in favor of arbitration," a construction imposed by the FAA in the presence of an ambiguity,[2] or "against the drafter," a construction imposed by state common law in the presence of an ambiguity. *See Mastrobuono*, 115 S. Ct. at 1218-19.[3] The

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[2] Assuming, for the sake of argument, that the FAA applies in state court proceedings. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 845 (1995) (Thomas, J., dissenting) (FAA does not apply in state courts).

[3] Sitting as a federal court in a diversity action, in *Mastrobuono* this Court found that the parties' choice of law clause did not incorporate the New York rule precluding the arbitral award of punitive damages. *Id.* at 1218. According to the Court, *solely with respect to the issue of punitive damages in arbitration*, the effect of the choice of law clause, when contrasted with the arbitration clause and the fact that punitive damages

New York Court of Appeals recognized these principles and simply enforced the terms of the agreement—as required by the FAA and New York arbitration law[4]—which unequivocally require judicial determination of limitations defenses. Indeed, the New York Court of Appeals denied petitioner's reargument motion that raised arguments nearly identical to those pressed in the petition for certiorari. (RA-1).

Petitioner nonetheless argues that the New York Court of Appeals' decision herein conflicts with this Court's holding in *Mastrobuono*. In making this argument, however, petitioner sidesteps a crucial distinction between the *Mastrobuono* case and this case. In *Mastrobuono*, this Court reviewed the decision of a federal court sitting in diversity construing an arbitration contract under state law *de novo*. Here, petitioner is asking this Court to review the New York Court of Appeals' construction of an arbitration contract under New York law. Since the construction of arbitration agreements, like all other contracts, is ordinarily a question of state law, *see First Options*, 1995 WL 306184, at *4; *Mastrobuono*, 115 S. Ct. at 1219 n.4; *Volt*, 489 U.S. at 474, this Court may not do what petitioner requests.

Indeed, contrary to petitioner's arguments, this Court's decision in *Volt*, not *Mastrobuono*, is directly on point. In *Volt*, unlike in *Mastrobuono*, this Court granted certiorari from a California state appellate decision. *Volt*, 489 U.S. at 472-73. The California state court in *Volt* had interpreted a

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were allowed under New York law in non-arbitral actions, was ambiguous. *Id.* The Court reasoned that since the contract was ambiguous, and given the rule that arbitration agreements should be interpreted in favor of arbitration and against the drafter (the securities firm), the choice of New York law was not sufficient to incorporate the rule under New York law that punitive damages are not allowed in arbitration. *Id.* Clearly, these principles of contract construction are only implicated if the agreement is deemed to be ambiguous.

[4] New York's arbitration statute, which served as the model for the FAA, specifically renders arbitration agreements enforceable. *Compare* N.Y. Civ. Prac. L. & Rules 7501 [hereinafter CPLR] *with* 9 U.S.C. § 2.

contract containing a simple California choice of law clause to incorporate California arbitration law allowing a pre-arbitration stay of arbitration; such a stay would not have been authorized under the FAA in the absence of a choice of law clause in the agreement. *Id.*

In refusing to revisit the issue of contract construction in *Volt*, this Court stated that "interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.* at 474. Indeed, in *Mastrobuono* this Court specifically distinguished *Volt* on this ground, noting that in *Mastrobuono* it was simply reviewing "a federal court's interpretation of this contract" *after* the arbitration, and could therefore review that interpretation *de novo*. *Mastrobuono*, 115 S. Ct. at 1217 n.4.; *see id.* at 1221-23 (Thomas, J., dissenting) ("This case amounts to nothing more than a federal court applying Illinois and New York contract law to an agreement between parties in Illinois . . . . [T]he majority's interpretation of the contract represents only the understanding of a single federal court regarding the requirements imposed by state law.")

Contrary to petitioner's suggestion, nothing in *Mastrobuono* explicitly or implicitly altered this Court's decision in *Volt* on issues concerning either the primacy of state court decisions on contract construction or the preemptive effect of the FAA. Indeed, *Mastrobuono* reaffirmed this Court's prior ruling in *Volt* that, under the FAA, contracts must be enforced according to their terms, even if the terms of the contract call for application of state arbitration law. *Mastrobuono*, 115 S. Ct. at 1215 (parties may " 'specify by contract the rules under which that arbitration will be conducted' " (quoting *Volt*, 489 U.S. at 479)).

Accordingly, the New York Court of Appeals' decision below construing the agreement at issue herein to allow judicial resolution of limitations defenses pursuant to the parties' choice of New York law does not warrant review by this Court.

II. THE FAA DOES NOT PREEMPT THE PARTIES' CONTRACTUAL CHOICE OF NEW YORK LAW TO GOVERN THE ARBITRATION AGREEMENT AND ITS ENFORCEMENT

Once the terms of the agreement are determined by a court, only then may a court decide whether the application of state law in accordance with the parties' agreement undermines the goals and policies of the FAA. *Volt*, 489 U.S. at 476-77.[5] Petitioner's argument that, under the FAA, a party cannot agree to the application of state arbitration law was explicitly rejected in *Volt*, and, contrary to petitioner's contentions, was never addressed in *Mastrobuono*.

In *Volt*, this Court squarely rejected appellant's arguments that the state court's interpretation of the contract to allow application of state arbitration law pursuant to a simple choice of law clause waived a federally guaranteed right to compel arbitration or that the state court's construction of the choice of law clause violated the settled rule that agreements must be interpreted with healthy regard for the federal policy favoring arbitration, arguments similar to those made by petitioner here. *Id.* at 474-75. As this Court emphasized in *Volt*, in language relied on by the New York Court of Appeals herein, "interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply does not offend the liberal rule of construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA." *Id.* at 476.[6]

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[5] The Court need not decide whether the FAA applies in state court because, even if it does, it does not change the result here.

[6] Moreover, petitioner incorrectly characterizes New York arbitration law in her petition for certiorari as "hostile" to arbitration. New York was the first state to require enforcement of arbitration agreements, and it was New York's arbitration statute after which the FAA was modeled. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n.13 (1967); *Weinrott v. Carp*, 32 N.Y.2d 190, 198-99, 344 N.Y.S.2d 848, 856, 298 N.E.2d 42, 47 (1973) (the FAA "is almost identical to, and

Clearly, after *Volt*, if the terms of the arbitration agreement are free from doubt and require application of state arbitration law, or have been adjudicated as such by the highest court of the state whose law applies, then that state law must apply in order to enforce the parties' agreement according to its terms under the FAA. Any other result "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479.

In *Mastrobuono*, by contrast, this Court never addressed whether enforcement of the parties' agreement to preclude the arbitral award of punitive damages would be inimical to the policies behind the FAA. This Court simply reviewed the agreement to determine whether it allowed arbitration of punitive damages demands. *Mastrobuono*, 115 S. Ct. at 1216 ("the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages").

According to the Court, the agreement at issue in *Mastrobuono*, because it was ambiguous on the issue and was drafted by the securities firm, allowed punitive damages demands to be arbitrated. *Id.* at 1218-19. Since the agreement here has been determined by the New York Court of Appeals to unambiguously require judicial resolution of limitations issues, this Court's construction of a different agreement in *Mastrobuono* is irrelevant.

Moreover, petitioner's contention that *Mastrobuono* requires application of New York statutory arbitration law only if the agreement is an "unequivocal" expression of the parties' intent that New York arbitration law apply is to no avail. First, in *Mastrobuono* this Court did not hold that a choice of law clause *must* constitute an unequivocal exclusion

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is derived from, our own arbitration statute"). The FAA contains no provision for judicial determination of limitations issues, however, because that provision was not added to the New York statute until 1959. *See* N.Y. Civ. Prac. Act § 1458-a (added by 1959 Laws c. 235).

on its face of claims or defenses from arbitration in order to render such claims non-arbitrable; *Mastrobuono* merely stated that the agreement therein, which was found to be ambiguous, was not an unequivocal exclusion from arbitration of the "important substantive right" to punitive damages claims. *Id.* at 1217-19. The "unequivocal expression" aspect of the Court's decision in *Mastrobuono* was simply one part its construction of the agreement in accordance with general common law principles of contract construction, the "more important inquiry" was the construction of the contract as a whole. *Id.* at 1217. Once again, that task has been performed by the New York Court of Appeals here and should not be disturbed.

Second, as discussed in more detail below (*see infra* Point III), under New York law, as construed by the New York Court of Appeals, the agreement here *is* an unequivocal expression of the parties' intent that at the very least, New York *statutory* arbitration law applies to allow courts to decide limitations defenses. Petitioner simply ignores the fact that *Mastrobuono* was limited solely to the question of whether that agreement incorporated New York *decisional* law precluding the arbitral award of punitive damages, which are available in court—not a statute allowing judicial determination of limitations defenses, which apply in both arbitration and in court. *Id.* at 1216.

Simply put, petitioner trumpets this Court's decision in *Mastrobuono* as if it fundamentally changed how courts should apply the FAA to arbitration agreements. Petitioner's reading of *Mastrobuono* is strained, at best. This Court has repeatedly held that the FAA simply requires enforcement of the terms of arbitration agreements, like any other contract, and that state courts have the primary authority for construing such contracts. (Indeed, that is all the explicit language of the FAA requires. *See* 9 U.S.C. § 4.) The FAA was relevant in *Mastrobuono* only to the extent the terms of the agreement were

held to be ambiguous as a matter of state law, in the absence of a state court construction of the arbitration agreement.

Here, however, the highest court of the State of New York, the preeminent authority on issues of contract construction under New York law, has held as a matter of law that there is no ambiguity in the agreement here and that the terms of the agreement require judicial resolution of limitations defenses. Failure to enforce the agreement, so construed, would therefore inhibit the policies behind the FAA.[7] Accordingly, there is nothing for this Court to decide on review and the petition for certiorari should be denied.[8]

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[7] Further, there is no FAA policy, either expressed or implied, against judicial determination of limitations defenses *if that is what the parties' agreement requires*, even if the result of the application of such defenses is that the arbitration will not go forward. *See* 9 U.S.C. §§ 1-16. Moreover, federal courts have long recognized that parties may agree to have these issues decided by courts, without abrogating the policies behind the FAA. *Hanes Corp. v. Millard*, 531 F.2d 585, 598 (D.C. Cir. 1976) (court may determine limitations issues under the FAA unless the parties' agreement clearly contemplated commitment to the arbitrators of these issues); *cf. Conticommodity Services, Inc. v. Philipp & Lion*, 613 F.2d 1222, 1224 (2d Cir. 1980) (in absence of agreement to the contrary, contractual limitations provision is for arbitrators).

[8] Thus, the issue presented by the agreement here is unlike the issue presented in *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995), in which the parties agreed to arbitrate all controversies, yet one party sought to evade the FAA by arguing that the transaction did not involve commerce and, therefore, Alabama state law that prevented enforcement of arbitration agreements applied. *Id.* at 837. *Allied-Bruce* did not involve an Alabama choice of law clause in the arbitration agreement and the applicable state law here does not render the agreement unenforceable. Here, the only proper interpretation of the choice of law clause in the parties' agreement requires arbitration of the merits of all controversies *except that limitations defenses may be decided by courts*. Judicial determination of limitations defenses therefore does not impermissibly foreclose arbitration of the merits of claims, it merely requires judicial determination of the timeliness of claims, pursuant to the parties' agreement.

III. ENFORCEMENT OF THE ARBITRATION AGREEMENT ACCORDING TO ITS TERMS REQUIRES APPLICATION OF NEW YORK LAW ALLOWING JUDICIAL RESOLUTION OF LIMITATIONS ISSUES

Even if this Court could substantively review the New York Court of Appeals' determination that the agreement requires application of New York law allowing judicial determination of limitations defenses, it must come to the same result. Specifically, with respect to contractual choice of law clauses, the New York Court of Appeals has held, prior to its decision herein, that "the parties' manifested intentions to have an agreement governed by the law of a particular jurisdiction are honored . . . it is as though the law of the selected jurisdiction were *incorporated into the agreement by reference*." *Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 265 n.*, 401 N.Y.S.2d 176, 179-80 n.*, 372 N.E.2d 12, 15 n.* (1977) (emphasis added) (citing Restatement (Second) of Conflict of Laws § 187); *cf.* N.Y. Gen. Oblig. L. § 5-1401. Accordingly, the New York Court of Appeals here was correct in determining that "under this agreement the parties agreed to refer questions of timeliness to the courts by *incorporating* New York law." *Manhard*, 85 N.Y.2d. at 202, 623 N.Y.S.2d at 805 (emphasis added). (8-A). Thus, under New York law, no ambiguity can be found to exist here.

Moreover, there is no reason to distinguish an arbitration provision from any other provision in a contract; as the New York Court of Appeals properly held, as a matter of New York law, the arbitration clause—"*like all other provisions in the contract*—was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning . . . its enforcement." *Id.* (emphasis added).[9]

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[9] Thus, unlike in *Mastrobuono*, the arbitration agreement and choice of law clause cannot be considered separately—"neither sentence intrud[ing] upon the other." *Mastrobuono*, 115 S.Ct. at 1219. As the New

Similarly, the agreement must be construed as a whole—there is no room here to interpret the choice of New York law to include only the "substantive" rules New York courts would apply *unrelated to arbitration*. Logically, a choice of law clause in an *arbitration* agreement must require application of New York *arbitration* law. *See Slatt v. Slatt*, 64 N.Y.2d 966, 967, 488 N.Y.S.2d 645, 646, 477 N.E.2d 1099, 1100 (1985) (in construing contracts, "effect must be given to the [parties'] intent as indicated by the language used"). Otherwise, *the choice of law clause would have absolutely no meaning with respect to the enforcement of the arbitration provision*, which the agreement clearly requires. There is simply no authority under New York law for a court to rewrite the terms of the parties' contract in such a manner. *Slatt v. Slatt*, 64 N.Y.2d at 967, 488 N.Y.S.2d at 646, 477 N.E.2d at 1100 (courts may not fashion new contract under guise of contract construction). Indeed, such a determination would violate the settled principle of contract construction that a contract should be interpreted to give effect to *all* of its provisions. *Weiss v. Weiss*, 52 N.Y.2d 170, 174, 436 N.Y.S.2d 862, 864, 418 N.E.2d 377, 379 (1981). Accordingly, under the plain meaning of the agreement, the New York Court of Appeals correctly held, under New York law—the law the New York Court of Appeals is charged with developing and interpreting—that New York arbitration law must govern.

In addition, because this case involves statutes of limitations, not punitive damages, this case does not implicate the concern expressed by the Court in *Mastrobuono* that the arbitration claimant unwittingly waived a right to relief that would be available under "New York law" in a non-arbitral context. In fact, the Court found the *Mastrobuono* agreement ambiguous because New York law allowed punitive damages in court, but not in arbitration, and the agreement contained

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York Court of Appeals' contract construction here illustrates, the *Manhard* choice of law clause, by its terms, "intrudes" upon the *entire* agreement, including the arbitration provision and its enforcement.

no such distinction on its face. *Mastrobuono*, 115 S. Ct. at 1217.

Here, however, there is no such potential ambiguity—New York law, like every other state's law, limits the time within which claims may be brought pursuant to express statutory limitations periods, *and these rules are applicable in both forums*. Thus, New York's statutory arbitration law (CPLR 7501-14), which affords arbitration respondents the option of having courts rather than arbitrators determine statute of limitations defenses, does not preclude arbitral determination of substantive claims, but merely authorizes judicial determination of these procedural defenses, which is routinely available in the courts.

Thus, under ordinary rules of contract interpretation, as applied by the New York Court of Appeals, no "ambiguity" arises; the New York statutory provision allowing judicial determination of limitations defenses must therefore apply to the enforcement of the arbitration agreement pursuant to the clear and unambiguous choice of law clause therein. Nothing in the *Mastrobuono* decision supports petitioner's contention that the Court of Appeals construed the agreement incorrectly.

Finally, the contract at issue here provides that the agreement "and its enforcement" is to be governed by New York law. The *Mastrobuono* contract, on the other hand, merely stated that it was to be "governed by the laws of the State of New York." *Mastrobuono*, 115 S. Ct. at 1214. In interpreting the contract here, the Court of Appeals properly placed particular emphasis on the language "and its enforcement," as illustrating the parties' intention to incorporate New York arbitration law into their agreement. *Manhard*, 85 N.Y.2d at 202, 623 N.Y.S.2d at 805. (8-A). Indeed, the Court held that "[a]lthough the parties broadly agreed to arbitrate 'any controversy' arising from the customer agreements, that clause—like all other provisions in the contract—was subject to the parties' additional qualification that New York State law provides the basis for questions concerning not only the agreement, *but more critically, its*

enforcement." *Id.* (emphasis added).[10] If anything, the *Mastrobuono* decision, by focusing on the importance of contract analysis, affirms the New York Court of Appeals' construction of the parties' agreements at issue herein and the importance placed by the New York Court of Appeals on the phrase "and its enforcement." Petitioner simply fails to explain why these words are not "critical," indeed dispositive, as found by the New York Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: New York, New York
June 19, 1995

Respectfully submitted,

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[10] Petitioner's contention that the phrase "and its enforcement" could have had numerous other "meanings" begs the question. Merely reciting a laundry list of other ways in which the "and its enforcement" language may apply actually highlights petitioner's failure to distinguish the enforcement of the arbitration provision from the enforcement of any other provision of the contract. Petitioner's purported "other interpretations" are not alternative to the view that New York arbitration law applies; all of these "interpretations," including the "interpretation" that New York arbitration law applies to the enforcement of the arbitration provision, are required by the plain language of the parties' agreement.

STATE OF NEW YORK
COURT OF APPEALS

Mo. No. 428

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of June, 1995

Present, HON. JUDITH S. KAYE, *Chief Judge*, Presiding.

In the Matter of Smith Barney, Harris Upham & Co., Inc.,

Appellant,

—v.—

Charlie Luckie, Jr., et al., and Doris Kahn,

Respondents.

In the Matter of Merrill Lynch, Pierce, Fenner & Smith, Inc., et al.,

Appellants,

—v.—

Margaret B. Manhard,

Respondent.

A motion for reargument to the Court of Appeals in the above causes having been heretofore made upon the part of the respondents Kahn and Manhard herein, papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Judge Levine took no part.

Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Mo. No. 428

Decision June 7, 1995

In the Matter of Smith Barney, Harris Upham & Co., Inc.,
Appellant,

—v.—

Charlie Luckie, Jr., et al., and Doris Kahn,
Respondents.

In the Matter of Merrill Lynch, Pierce,
Fenner & Smith, Inc., et al.,
Appellants,

—v.—

Margaret B. Manhard,
Respondent.

Motion for reargument denied with one hundred dollars costs and necessary reproduction disbursements.

Judge Levine took no part.